JAN 23 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

JOINT APPENDIX

On Appeal From the Supreme Court of Georgia

Jurisdictional Statement Filed September 27, 1973
Probable Jurisdiction Noted December 10, 1973

TABLE OF CONTENTS

PART I

RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW

	Appendix Page	Record Page
A. Superior Court of Dougherty County, State of Georgia	3	
B. Supreme Court of the State of Georgia	4	

PART II

PORTIONS OF STATE COURT RECORD RELATING TO QUESTIONS PRESENTED

A. Superior Court of Dougherty County, State of Georgia		
Arrest Warrant (February 10, 1972)	5	R. 4, 4
Accusation (March 6, 1972)	7	R. 4, 6
Demurrer to Accusation (March 20, 1972)	9	R. 4, 8
Order Overruling Demurrer (March 20, 1972)	13	R. 4, 12
Excerpts From Trial Transcript (March 22, 1972)	14	R. 5, 1, 4-7, 11-16, 47-49, 61-77

	Appendix Page	Record Page
Fine and Sentence of Probation (March 23, 1972)	40	R. 4, 69
Notice of Appeal to the Supreme Court of Georgia (April 21, 1972)	43	R. 4, 1
Order to Transmit to the Supreme Court of Georgia the Film, "Carnal Knowledge", and All Physical Evidence Introduced at Trial as Part of the Record (November 21, 1972)	45	R. 4, 15
B. Supreme Court of the State of Georgia		
Appellant's Enumeration of Errors (December 18, 1972)	46	R. 3, 1, 10-13
Opinion (July 2, 1973)	52	R. 1
Remittitur of the Supreme Court of Georgia (August 15, 1973)	69	R. 2

APPENDIX

PART I

RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, STATE OF GEORGIA

STATE OF GEORGIA, *Plaintiff*,
v.
BILLY JENKINS, *Defendant*.

CASE NUMBER 24,883
TRANSCRIPT OF CRIMINAL DOCKET ENTRIES

DATE	DOCKET ENTRY
1972	
March 6	Arrest Warrant
March 6	Accusation
March 20	Demurrer to Accusation
March 20	Order Overruling Demurrer
March 22	Nol Prossed as to Woodall
March 23	Verdict of Guilty as to Jenkins
March 23	Sentence
April 21	Notice of Appeal
November 21	Order to Transmit Film and Physical Evidence

IN THE

SUPREME COURT OF GEORGIA

BILLY JENKINS,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

No. 27692
TRANSCRIPT OF
DOCKET ENTRIES

DATE	DOCKET ENTRY
1972	
December 1	Notice of Appeal
December 1	Trial Court Clerk's Transcript
December 1	Trial Court Reporter's Transcript
December 1	Receipt of the Film and Three (3) Cartons of Exhibits
December 18	Enumeration of Errors
December 19	Brief of Appellant Submitted
1973	
January 18	Brief of Appellee Submitted
July 2	Opinion and Judgment
August 15	Remittitur to Trial Court Clerk
September 20	Notice of Appeal to United States Supreme Court
September 26	Film and Three (3) Cartons of Exhibits Transmitted to the United States Supreme Court

APPENDIX

PART II

PORTIONS OF STATE COURT RECORD RELATING TO QUESTIONS PRESENTED

[Arrest Warrant]

WARRANT

THE STATE
VERSUS

Billy Jenkins

Charge VIOLATION GEORGIA CODE SECTION 26-2105

Lynn L. Stout Prosecutor

The above defendant made bond on the ____ day of _____, 19__

Sheriff's Office

WITNESS:

Lynn L. Stout - Investigator

J. Wayne Parrish - Investigator

Warrant delivered to sheriff's office

Date February 10, 1972

GEORGIA, Dougherty County

Personally Comes Lynn L. Stout Who, on oath, says to the best of his knowledge and belief Billy Jenkins did, in said County, on the 9th day of February, 19 72, commit the offense of violation of Georgia Code Section 26-2105. And deponent makes this affidavit that a warrant may issue for his arrest.

_____ (Seal)

Sworn to and subscribed before me 10th day of February, 19 72

_____

Judge City Court, Albany, Georgia

GEORGIA, Dougherty County

To any Sheriff, Constable or Marshal of said State—GREETING:

Lynn L. Stout Makes oath as above which is hereby made part of this warrant. You are hereby commanded to arrest Billy Jenkins and bring him before me or some other judicial officer of said County to dispose of as the law directs. Fail not.

Witness my hand and seal February 10, 1972.

_____ (Seal)

Judge City Court, Albany, Georgia

A commitment hearing was held this _____ day of _____ 19____ and after hearing evidence it is ordered that the defendant be committed for said offense in default of his giving bond, with good security, in the sum of _____ Dollars for his appearance at the Superior Court to be held on the third Monday in _____ 19____.

Witness my hand and seal _____ 19____.

_____

Judge Pro Hac Vice City Court, Albany, Georgia

[Accusation]

No._____

SUPERIOR COURT,
DOUGHERTY COUNTY

March Term, 19 72

THE STATE
vs.

Billy Jenkins

DISTRIBUTING OBSCENE MATERIAL

ACCUSATION

Foreman.

ROBERT W. REYNOLDS,
District Attorney

Lynn Stout

Prosecutor.

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this 6th day of March 19 72.

Clerk.

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

I _____ Foreman.

Robert W. Reynolds, District Attorney,

on information of Lynn Stout

In the name and behalf of the citizens of Georgia, charge and accuse Whitfield Woodall and Billy Jenkins with the offense of Distributing Obscene Material for that the said accused, in the County aforesaid, on the 13th day of January, Nineteen Hundred and Seventy-Two, did then and there knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person

contrary to the laws of said State, the good order, peace and dignity thereof.

ROBERT W. REYNOLDS, District Attorney

STATE OF GEORGIA v. WHITFIELD WOODALL and BILLY JENKINS, *Defendants*	ACCUSATION NO. 24883 DOUGHERTY SUPERIOR COURT MARCH TERM, 1972

Come now the defendants in the above identified and numbered accusation, prior to arraignment, and demur to the same as follows:

1.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege the commission of any criminal offense under the Law of the State of Georgia.

2.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege the commission of any criminal offense under the Law of the State of Georgia, as such law is restricted by the First Amendment to the United States Constitution as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution.

3.

Defendants demur generally to the accusation, as a whole, upon the ground that the same does not allege, as an essential element of the purported crime,

the language contained in Section 26-2101(b), Criminal Code of Georgia, as follows:

> "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

4.

Defendants demur generally to the accusation as a whole, as being violative of the First Amendment of the United States Constitution, Code of Georgia 1933, Section 1-801, as applied to the State of Georgia through application of the Fourteenth Amendment of the United States Constitution, Code of Georgia 1933, Section 1-815, in that the Georgia statute upon which the said accusation is based, Section 26-2105, Criminal Code of Georgia, as amended, and Section 26-2011, Criminal Code of Georgia, fails to include as an essential element of the purported crime the following language:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customery limits of candor in describing or representing such matters."

5.

Defendants demur generally to said accusation as a whole, in that the Georgia statute upon which the same is based, Section 26-2105, Criminal Code of Georgia, and Section 26-2011 of the Criminal Code of Georgia, renders the conduct described in said Section 26-2105, as defined in said Section 26-2011, a crime by equating public conduct as defined in said Section 26-2011, with non-public conduct, as defined by said Section 26-2105, in violation of constitutionally protected freedom of expression as defined by the First Amendment to the United States Constitution, Section 1-801, Georgia Code 1933, as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution, Section 1-815, Georgia Code 1933.

6.

Defendants demur generally to the accusation as a whole, in that the Georgia statute upon which the same is based, Section 26-2105, Criminal Code of Georgia, construed in connection with that portion of Section 26-2101, Criminal Code of Georgia, relating to the definition of the word "knowing", is violative of the First Amendment of the United States Constitution, Section 1-801, Georgia Code 1933, as applied to the State of Georgia through application of the Fourteenth Amendment to the United States Constitution, Section 1-815, Code of Georgia 1933, in that said Georgia statutes deprive defendants of First Amendment freedom of expression by burdening defendants with self-censorship.

WHEREFORE, defendants pray that each and every ground of this demurrer be inquired into and sustained, and the accusation dismissed.

SMITH, GARDNER, WIGGINS, GEER & BRIMBERRY:

By: /s/ Peter Zack Geer
PETER ZACK GEER,
Of Counsel for Defendants

/s/ Charles F. Hatcher
CHARLES F. HATCHER,
Of Counsel for Defendants

STATE OF GEORGIA	ACCUSATION NO.
v.	24883
WHITFIELD WOODALL	DOUGHERTY
and BILLY JENKINS,	SUPERIOR COURT
Defendants	MARCH TERM, 1972

The demurrer filed by the defendants prior to arraignment on this date, is hereby overruled, and each and every ground of said demurrer is hereby overruled.

SO ORDERED and ADJUDGED this 20th day of March, 1972.

/s/ Asa D. Kelley, Jr.
Judge, Superior Court,
Dougherty Judicial Circuit

**IN THE SUPERIOR COURT OF
DOUGHERTY COUNTY,
STATE OF GEORGIA**

STATE OF GEORGIA,
Plaintiff
v.
BILLY JENKINS,
Defendant

Case Number 24,883
Distributing Obscene
material
March Term, 1972

TRANSCRIPT

HEARD BEFORE HIS HONOR,
ASA D. KELLEY, JR., JUDGE,
DOUGHERTY JUDICIAL CIRCUIT, PRESIDING,
AND A JURY.
March 22, 23, 1972

APPEARANCES:

FOR THE STATE:
HONORABLE ROBERT W. REYNOLDS,
Attorney at Law, District
Attorney of the Dougherty
Judicial Circuit, Albany, Georgia.

FOR THE DEFENDANT:
HONORABLE PETER ZACK GEER,
and HONORABLE CHARLES F. HATCHER,
Attorneys at Law, of the law firm of Smith,
Gardner Wiggins, Geer and Brimberry,
Albany, Georgia.

BOBBY G. BRINSON, Official
Court Reporter of the Dougherty
Judicial Circuit, Albany, Georgia.

* * *

[R. 5., 4-7]

Thereupon,

LYNN STOUT,

a witness produced on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REYNOLDS:

Q. You are Lynn Stout?
A. That's correct.
Q. Where are you employed, Mr. Stout?
A. Investigator with the Dougherty County Sheriff's Department.
Q. And since July of '71, have you had occasion from time to time to go to the Broad Avenue Cinema?
A. Yes, sir, I have.
Q. What county is that in?
A. Dougherty County.
Q. And do you know Billy Jenkins?
A. Yes, sir, I do.
Q. Have you seen him over there often?
A. Yes, sir; most every time that I went either going into the theater or upon leaving, I saw him in the lobby.
Q. Did you have occasion to talk to him since last July?
A. Yes, sir, I have talked to him on several occasions.
Q. Do you know what his duty is over there at the Broad Avenue Cinema, in what capacity he is?
A. He is running the theater. I think his formal title would be Manager.
Q. On January the 13th, did you have occasion to go there?
A. Yes, sir, I did.

Q. At that time did you seize some movie film?
A. Yes, I did; I seized with a search warrant the movie entitled Carnal Knowledge.
Q. Do you have that film now?
A. Yes, sir, it's in my office.
Q. Had that film been playing there on that day?
A. Yes, sir, it had.
Q. At the time that you went over there on the 13th of January, was Mr. Billy Jenkins there?
A. Yes, he was.
Q. Did you show him your papers?
A. Yes, sir, I did.
Q. After then is when you obtained the film?
A. Excuse me?
Q. After you showed him the paper, you obtained the film?
A. Yes, sir, we went upstairs and the film was rewound and we seized it with a search warrant and a copy of the search warrant was given to Mr. Jenkins.

MR. REYNOLDS: He's with you.

CROSS EXAMINATION

BY MR. GEER:

Q. Mr. Stout, how many people were there when you went to serve the search warrant?
A. You're speaking on the 13th?
Q. Yes, sir.
A. I would have to give an estimate because I didn't see the entire crowd.
Q. Give your best judgment?
A. A hundred and twenty-five or a hundred and fifty, something like that.

Q. All right. Now, Mr. Jenkins has never told you that he was the Manager of that theater, has he?
A. Not in those words he hasn't. I have been in the office and observed him making communications and calling and etcetera and I would assume that he runs the theater.
Q. How do you know that?
A. Well, he's the man that I served the warrant on. He's the man that gave all the orders to rewind the film and to have the people leave the theater and etcetera; he was in charge at the time that I made the seizure.
Q. Now, Mr. Stout, how many times did you seize Carnal Knowledge in Albany, Georgia?
A. Three or four times.
Q. Where was it first? Where was the first movie house that you seized Carnal Knowledge, Martin Twin?
A. No, sir.
Q. Where was it?
A. Broad Avenue Cinema.
Q. Do you have knowledge of the movie having been seized at Martin Twin?
A. Yes, sir, I drew the search warrant up; I didn't make the seizure.
Q. But you know that it was seized there?
A. Yes, sir, I do.
Q. What is your official title?
A. Chief Investigator for the Sheriff's Office.
Q. Now, you have viewed Carnal Knowledge prior to the seizure, had you not?
A. Prior to the seizure where?
Q. Well, at the Martin Twin?
A. Yes, sir.

Q. And, of course, you viewed it yesterday, didn't you?
A. Yes, sir, and I viewed it on the 14th when the Grand Jury saw it.
Q. And then again you viewed it yesterday?
A. Day before yesterday.
Q. Day before yesterday?
A. Yes, sir.
Q. Now, of course, in seizing the film, you were doing so under what you considered to be your duty, did you not?
A. Yes, sir.
Q. As a law enforcement officer?
A. Yes, sir.

* * *

[R. 5, 11-16]

Q. All right, assuming that there is a movie playing currently that showed last night and showed again today in Dougherty County, Georgia, at Martin Twin Theater Number I entitled "Such Good Friends", assuming that in the first reel of this movie there is a nude scene of a man with either a book or a card draped over his sex organ and further assume in the first reel that language of "God damn" is used and the language "Horny" is used; assume in the second reel of this movie there is a simulated love making scene of sexual intercourse; assuming that language is used "Son of a bitch" and language used "Bastard" and language used "Sorry we didn't screw more" and assuming that in the third reel there is an insinuation of lesbianism as one woman asks another woman "Is he as good in bed as I am?" And assuming further that in the third reel there is language used "Screw-

ing" and then assuming that in the third reel there is language used "You prick, let's fuck our way to mental health" or "How do you beat the shit out of a man who has screwed your wife"; answer "You don't, you beat the shit out of her" and then in the fifth reel, there is a complete frontal nude scene of a woman with her breasts showing and her pubic hair visible and further assume that in the fifth reel there is a simulated love making scene in which the man cannot get an erection and there is conversation about him not being able to get up an erection and then let's assume that in the fifth reel that there is a scene of a woman who undresses a man while he is standing talking over the telephone and performed an act of sodomy upon him, that is by unnaturally placing the penis in her mouth and further assume that he hangs up the phone and as he reaches a climax and has an ejaculation, he offers the following dialogue as an apology to the woman as his organ comes out of her mouth and said, "Oh my God, I got it on your nose."

Assuming that you have viewed a movie like that, would you swear out a search warrant for it and have it prosecuted under the Georgia Obscenity Statute?

A. If I observed what you described, yes sir.

Q. Well, would you go out this afternoon and view this movie and take that action?

A. I'll probably still be in Court here.

Q. Well, if you are excused as far as the Defendant is concerned, will you do that this afternoon?

A. I will. It will have to be discussed with the District Attorney because he is going to be the prosecutor in the case as I did on this case and all the other

cases that I have investigated during the months of July and August. This was our procedure in all the cases that I investigated and — in July and August, some 42 or 43 films and every one of them was discussed with the District Attorney before any action was taken.

Q. Mr. Stout, don't you often swear warrants out in criminal cases without discussing it with the District Attorney?

A. Not in movies.

Q. But in the crimes, in crimes, don't you swear criminal warrants out without discussing it with the District Attorney?

A. Yes, sir.

Q. Why would you have to discuss this one with the District Attorney?

A. It's the general practice. I have never been involved in movies before these in this period of movie investigation so to speak. I discuss each movie with the District Attorney before I take any action.

Q. All right, but that is not a matter of law, that is a matter of practice?

A. Yes, sir, that's correct.

Q. So, under the law, you could go out this afternoon and view this movie if you are free and you could swear out a warrant? You could swear out a search warrant on your own without asking anybody about it, couldn't you?

A. Yes, sir, I imagine so.

Q. So, if you get free, will you do that?

A. I will talk to the District Attorney about it.

Q. Well, do you talk with him before the other crimes, before they are prosecuted and before you prosecute them?

A. Most of them.

Q. You mean that you don't swear out a warrant without consulting with the District Attorney?
A. The District Attorney is the man who is going to prosecute the case and I want to handle the case the way that he wants to prosecute it.
Q. I understand that, Mr. Stout; I didn't —
A. That's the reason I discuss the case with him and give him an opportunity to answer, Mr. Geer.
Q. The question is do you not generally swear out criminal warrants without asking the District Attorney in other areas other than movie film?
A. Criminal warrants, yes, sir; are you speaking of search warrants or criminal warrants?
Q. Don't you swear out search warrants in other areas other than movies without talking with the District Attorney?
A. In some cases, yes.
Q. You do it often, don't you?
A. We don't actually swear out that many search warrants.
Q. But you don't have to go to ask the District Attorney's permission to swear one out?
A. No, I don't have to.
Q. You are familiar with the procedure in the Sheriff's Office that a Deputy Sherif doesn't have to run around and ask the D. A. whether they can swear out a warrant, do they?
A. Mr. Parrish and I handle 95 percent of the search warrants.
Q. You do it without asking permission from the District Attorney?
A. On some occasions, yes.
Q. On any occasion other than dealing with films?
A. It would depend on — it depends on the case when

we discuss it. We discuss cases a lot of times and we discuss the case with the D. A. and ask his recommendations. He is the man that has to try the case.

Q. But your answer is if these things laid out before you as things being in the film "Such Good Friends" and that if you saw it, you would go and swear out a warrant?

A. If I was sent out to view the film in my official capacity and it was there as you described that it was there as you described it in the letter you have that you read from, yes, I would.

Q. Well, suppose you hear some testimony under oath in this case that this is, in fact, the truth; what will you do?

A. I will have to be sent out.

Q. By whom?

A. By my boss, the Sheriff.

Q. Well, you first said the D. A.

A. Well, I'm directly responsible to the Sheriff.

Q. That's what I thought.

A. That's right.

Q. You are not saying that Mr. Reynolds, he doesn't hire you or fire you, does he?

A. No, sir.

Q. You work with him in connection with law enforcement, but you work for the Sheriff, do you not?

A. That's correct.

Q. Now, would you have to get Mr. Reynold's permission to go out here and seize this film that is now showing if, in fact, you went and viewed it and found these things? Would you have to get his consent?

A. Mr. Geer, if I were sent out there, I would be sent out by the Sheriff. The results of what I saw out

there would be discussed with Mr. Reynolds before I obtained a search warrant.

Q. The Sheriff would only send you out at the District Attorney's recommendations, is that correct?

A. I don't know about that.

Q. He hasn't sent you anywhere else for a film without the District Attorney recommending it, has he?

A. The Sheriff, that's correct.

Q. He has not, has he?

A. Not to my knowledge, no, sir.

Q. You were sent — you were sent by the Sheriff

* * *

[R. 5, 47-49]

Thereupon,

BILLY JENKINS,

the Defendant herein, was called and made the following unsworn statement:

THE COURT: Mr. Defendant, you have a right to make to the Court and to the Jury such statement as you deem proper in your defense. You may relate to the members of the Jury anything that you want to that might be helpful in your defense; go ahead.

THE DEFENDANT: Gentlemen of the Jury, I am Billy Jenkins and I have been in the theater management business for 10 years. I came to Albany, Georgia in February of 1966 as the City Manager of Martin Theaters in charge of their operation in Albany. In the ten year period, I have played all types of movies and have seen many

changes in the audience appeal as well as production changes to satisfy these changes in the audience's appeal.

As far as the motion picture, Carnal Knowledge is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. The picture was critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in the picture.

Carnal Knowledge played in 29 towns in the State of Georgia and is now booked into 50 or 60 more theaters for spring and summer showing.

Included in these showings are Camilla, Georgia, which has the picture booked for March the 31st and Camilla is only 30 miles from Albany. A few of the 29 cities and towns where Carnal Knowledge has played without incident are Cordele, Valdosta, Douglas, Fitzgerald, Macon, Savannah, Milledgeville, Augusta, Dalton, Gainesville, Carlton, Rome and is in Atlanta now showing for the second time.

So, Gentlemen of the Jury, as I have said earlier, I have no knowledge of the motion picture, Carnal Knowledge, being obscene or violating any state or local laws.

Also, I would like to bring out one more thing in reference to Carnal Knowledge. We are not suggesting this movie should be shown to the children. We put — there is an R rating on the picture and we have not and don't intend to admit

anyone under the age of 18 in the theater; 18 year old and older will be the only ones that can see the picture.

MR. GEER: You may come down.

THE COURT: Is there anything further from the Defendant?

MR. GEER: May we have just a second, Your Honor? We rest, Your Honor.

THE COURT: Is there anything further from the State?

* * *

[R. 5, 61-77]

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, STATE OF GEORGIA

STATE OF GEORGIA, *Plaintiff* v. BILLY JENKINS, *Defendant*	Case Number 24,883 Distributing Obscene Material March Term, 1972

CHARGE OF THE COURT

Gentlemen of the Jury, an accusation has been returned accusing this Defendant of the offense of distributing obscene material. You will have the accusation out with you. It is not evidence, but you may refer to the accusation if you care to do so containing as it does the contentions of the State. All of these contentions, however, are denied by the Defendant.

The fact that the Defendant has been accused raises no presumption or inference whatsoever against him. You will not take the fact that an accusation has been returned against the Defendant as having any probative or evidentiary force or value whatever. The accusation is only the process which the law has adopted to bring the Defendant to trial, containing as it does the contentions of the State. All these contentions are denied by the Defendant.

The Defendant's plea of not guilty challenges and denies every material allegation in the accusation and, I charge you, before the State is entitled to a verdict

of conviction of the Defendant at your hands, the burden is upon the State of proving the Defendant's guilt, as charged, beyond a reasonable doubt.

The defendant enters upon his trial with the presumption of innocence in his favor and this presumption remains with him throughout the trial unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt. Unless you find such evidence in this case, you would acquit the Defendant.

A reasonable doubt is just what the term implies. It is a doubt based upon reason. It is not a fancy or conjecture or supposition that the Defendant might be innocent; it is just such a doubt as a reasonable man would have, act upon or decline to act upon in a matter of importance or of grave concern to himself. In other words, it is the doubt of a fair minded, impartial Juror honestly seeking for the truth, and it may arise from a consideration of the evidence or from a lack of the evidence or from a conflict of the evidence or from the statement of the Defendant.

If, upon a consideration of all the facts and circumstances of this case, your mind is wavering, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the Defendant the benefit of that doubt and acquit him. If, on the other hand, no such doubt rests upon your mind, it would be equally your duty to return a verdict of guilty.

You are the sole and exclusive judges of the facts

in the case. You pass upon the weight, force and credit to be given to the evidence in the case and you alone determine the credibility of the witnesses who have testified in the case.

In passing upon the credibility of the witnesses, you are authorized to consider all the facts and circumstances of the case, the witnesses' manner on the stand, their means and opportunity for knowing the matters about which they testified; their interest or want of interest in the case; their intelligence or lack of intelligence; the nature of the matters to which they testified; the probability or improbability of their testimony; their bias or prejudice, if any, and also their personal credibility as the same may legitimately appear from the trial. You may also consider the witnesses' relation to the case or to the parties in the case. All these things are proper subject matters for your consideration insofar as they may legitimately appear from the trial of the case. It is for you to finally determine what credit is to be given a witness.

If there are conflicts in the case, it is your duty to reconcile those conflicts, if you can, so as not to impute perjury to any witness sworn, but if there are conflicts which you cannot reconcile, you should then believe that witness or those witnesses whom you think most entitled to credit.

The Defendant in this case has made a statement. In all criminal trials in this State, the Defendant shall have the right to make to the Court and Jury such statement in the case as he may deem proper in his defense. It shall not be under oath and shall have such force only as the Jury sees fit to give it. You may be-

lieve it in preference to the sworn testimony in the case, if you see proper to so do. You may believe it entirely as true; you may reject it entirely as false; you may believe it in part as true and you may reject it in part as false. The force, weight and credit to be given to the Defendant's statement is a matter entirely for you to determine.

There are two types of evidence. Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed.

To warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but they must exclude every other reasonable hypothesis save that of the guilt of the accused. I charge you, however, that whether dependent upon direct or circumstantial evidence, the true test in all criminal cases is not whether the conclusion at which the evidence points may be false, but whether or not the evidence is sufficiently strong to satisfy your minds and consciences as to a reasonable and moral certainty and beyond a reasonable doubt of the Defendant's guilt. If the evidence is thus strong, it would be your duty to convict. If the evidence is not thus strong, it would be equally your duty to acquit.

The witness may be impeached by disproving the facts testified to by that witness. When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the Jury to determine, but if a witness shall swear will-

fully and knowingly falsely, his testimony shall be discarded entirely unless corroborated by circumstances or other unimpeached evidence.

A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent to so do provided that the word knowing is used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter and the person has constructive knowledge of the obscene content if he has knowledge of the fact which would put a reasonable and prudent man on notice as to the suspected nature of the material.

Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the effort to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

Every person who, during the course of a play, nightclub act, motion picture, television production or other exhibition or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore

defined such limits as to take the movie outside of the protection of the person involved.

Freedom of speech and of the press guaranteed by the Constitution embraces all information and education with respect to the significant issues of the times; embraces all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In this case, the State contends that the Defendant is guilty of the offense charged. If you find beyond a reasonable doubt that the Defendant did commit the offense, then you would return a verdict in the following language: "We, the Jury, find the Defendant, Billy Jenkins, guilty."

Now, the Defendant contends that he is not guilty of the offense charged. He further contends that the State has not proved his guilt of any offense charged to a reasonable and moral certainty and beyond a reasonable doubt.

If, upon a consideration of the evidence or from a lack of the evidence or from the evidence of the statement of the Defendant or from the statement of the Defendant alone, you believe these contentions of the Defendant to be the truth of the case, then it would be your duty to find him not guilty, in which event, the form of your verdict would be: "We, the Jury, find the Defendant, Billy Jenkins, not guilty."

Now, you will notice on this accusation that there are two Defendants named. You are concerned here only with the guilt or the innocence of Billy Jenkins

and you will name him in your verdict whether he be guilty or not guilty. Whatever your verdict is, let one of your number write it in the space provided, date it and sign it as Foreman and return it into Court.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, have you been able to reach a verdict yet?

THE FOREMAN: No sir, we haven't.

THE COURT: Do not tell me how you stand for acquittal or conviction; tell me simply how you stand numerically.

THE FOREMAN: Well, Judge, we have had one vote and I would say that it would be about five and ten and that would not be for sure because some said that they were not committing themselves.

THE COURT: Well, we have this problem. Under the law, you are required to stay together and experience has shown that if you go to a hotel to eat that it will take about an hour and a half or something like that.

I was just wondering because it's going to take some time for some of you to make arrangements to spend the night, I imagine. So, I was just wondering if you would like to deliberate until around 7:30 and then we will arrange for you to be set up over at the hotel and you can make your

arrangements to spend the night and have your meal and resume your deliberations in the morning. Does that sound reasonable to you?

THE FOREMAN: Well, it will take awhile for them to set up at the hotel and suppose we just wait in the Jury Room until they set up at the hotel and we can just use that time to deliberate.

THE COURT: All right, we will do that. If you haven't reached a verdict at that time, then we will just let you make arrangements to spend the night and to get your meal and to resume deliberations in the morning.

THE FOREMAN: Could I ask you this? I think that a dictionary would be of some help if it were available to us.

THE COURT: Ordinarily not. There is no dictionary which has been introduced into evidence and you can resume your deliberations and we will let you know when arrangements are made.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, are you still unable to make a verdict?

THE FOREMAN: We haven't reached a verdict or close to it.

THE COURT: You are not close to it?

THE FOREMAN: No, sir.

THE COURT: All right, arrangements have been made for whatever you want to have to eat at the hotel and arangements have been made for rooms.

Now, please do not discuss this case with anyone and do not permit anyone to discuss it with you or in your presence. If anyone attempts to do so, you have an obligation to report that fact to the Court.

Now, each of you probably will have a television set. If anything comes on the television relative to this case, please turn it off and don't listen to it or if there is anything on the radio about this case, please don't listen to it. Keep your mind perfectly open as it relates to the evidence and the arguments and the charge and not by what some media has to say about the case.

Now, if you will, be back in the morning after having your breakfast over there and be here in the Courtroom in this box over here at 9:00 o'clock in the morning.

MR. GEER: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Thereupon, discussion was held off the record.)

THE COURT: If any of you should want to pick up a magazine, is there a magazine counter over there?

THE BAILIFF: Judge, there may be I don't know.

THE COURT: Is there any objection to them getting a newspaper from out of town? Does anybody have any objection to that?

MR. GEER: Your Honor, I do not.

THE COURT: Do not get the Albany Herald because there is probably some news in there about this case, but any other newspaper you may feel free to go ahead and get and do not discuss this case among yourselves tonight and let's come back in the morning and resume your deliberations and please be back in the box at 9:00 o'clock.

(Thereupon, hearing adourned.)

(EVENTS WHICH OCCURRED ON MARCH the 24th, 1972.)

THE COURT: All right, Gentlemen, if you will, go to your Jury Box and resume your deliberations.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, do you have any communications that you would like to make?

THE FOREMAN: Well, I think that we have just finally reached it, Judge; I don't know if we stayed in there 'til the 4th of July that we would get much further.

THE COURT: Has there been any change?

THE FOREMAN: Yes, sir, it's 11 to 1.

THE COURT: Well, some Jury is going to have to pass on this case.

THE FOREMAN: We have tried very diligently to reach a decision and it just looks like that it is impossible. We will be glad to do whatever you wish us to do.

THE COURT: Well, try it awhile longer and if you then find that you can't do it, we will have to re-evaluate it. At this time, I, would like to reiterate that I am not trying to force a verdict, but unless somebody has some deep abiding conviction that he cannot give up through reason and thinking, a verdict should be made because both the State and the Defendant wants this Jury to pass on this question.

THE FOREMAN: I can't say that it would help any, but if it could be done, if you could, could you read the charge? It might help some; I don't know.

THE COURT: Is there any particular part that you are interested in?

THE FOREMAN: I don't believe that it would be any particular part. We have tried to ascertain the particular question and haven't been able to get one.

THE COURT: I will be glad to do that if you think it would be helpful.

THE FOREMAN: I don't know whether that

would be in order or not; I thought that I would ask it.

THE COURT: Do you have copies of the Code Section that you have requested?

THE FOREMAN: That's correct, sir.

THE COURT: I can give you the whole charge again, but I don't know that that will help because — why don't you go back to your Jury Room and discuss any specific questions that you want to ask about the charge or whatever the law may be and then write out your request and I will see if we can answer it.

THE FOREMAN: All right.

(Thereupon, the Jury retired to the Jury Room.)

(Thereupon, hearing recessed.)

(Thereupon, the Jury returned to the Courtroom.)

THE COURT: Mr. Foreman, have you been able to reach a verdict.

THE FOREMAN: We have, Your Honor.

THE COURT: All right, Mrs. Gable, receive the verdict and publish it, please.

THE CLERK: State versus Bill Jenkins. We, the Jury, find the Defendant guilty, this 23rd day of March, 1972, William M. Dorsey, Foreman.

(Thereupon, the Jury was dismissed.)

THE COURT: You want to conclude this record now or would you like to wait?

MR. GEER: I have no feelings about it.

MR. REYNOLDS: I had just soon complete it now. I would like to make a recommendation to the Court. I would like to ask the Court to impose a fine on the Defendant of $1,000.00 and give him 12 months suspended under the condition that the movie, Carnal Knowledge, not be shown.

MR. GEER: I would like to ask the Court to impose on him a probationary sentence. This is a landmark case and the District Attorney has told the Jury that these Defendants have incurred considerable expense and, of course, there will be an appeal and I would suggest to the Court that the issue here is broader than Billy Jenkins, as the Court is aware, and I ask the Court not to impose a fine.

SENTENCE OF PROBATION
(Felony or State Misdemeanor and First-Offender)

IN THE SUPERIOR COURT
DOUGHERTY COUNTY, GEORGIA

THE STATE OF GEORGIA
vs.
BILLY JENKINS

CASE NO. 24883

OFFENSE: Distributing Obscene Material

MARCH TERM, 1972

(VERDICT) OF GUILTY

WHEREUPON, it is ordered and adjudged by the Court that the said defendant is hereby sentenced confinement for a period of Twelve (12) Months Probation (months) in the State Penal System or such other institution as the Director of the State Board of Corrections may direct, to be computed as provided by law. However, it is further ordered by the Court that the above sentence may be served on probation, provided that said defendant complies with the following general and special condition herein imposed by the Court as a part of this sentence:

(1) Do not violate the criminal laws of any governmental unit.

(2) Avoid injurious and vicious habits — especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

(3) Avoid persons or places of disreputable or harmful character.

(4) Report to the Probation Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.

(5) Work faithfully at suitable employment insofar as may be possible.

(6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

(7) Support his (her) legal dependants to the best of his (her) ability.

Other special conditions ordered by the Court are as follows:

It is further ordered by the Court that the defendant pay as specified: *Must pay a fine of $750.00 through the Adult Probation Office.*

IT IS the further order of the Court, and the defendant is hereby advised, that the Court may at any time revoke or modify any conditions of this probation or change the period of probation and may discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

This 23rd day of March, 1972 Asa D. Kelley, Jr., Judge Presiding.

Certificate of Service — This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he has been duly instructed regarding the conditions as set forth above.

This 23rd day of March, 1972, Benny F. Williams, Probation Supervisor.

Copy received and instructions regarding conditions acknowledged.

This 23rd day of March, 1972, Billy Jenkins, Probationer.

THE STATE

Versus

BILLY JENKINS,
Defendant

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA

ACCUSATION FOR DISTRIBUTING OBSCENE MATERIAL NO. 24883

NOTICE OF APPEAL

Notice is hereby given that BILLY JENKINS, defendant in the above named, numbered and stated case, hereby appeals to the Supreme Court of Georgia, from the verdict of the jury, dated March 23, 1972, finding the defendant guilty, and further appeals from the sentence of the Court signed by Asa D. Kelley, Jr., Judge presiding on the 23rd day of March, 1972, which said sentence was filed in the Office of the Clerk of Dougherty Superior Court on April 13, 1972.

The offense for which defendant was convicted is a misdemeanor, described in said Accusation No. 24883 as the offense of distributing obscene material and is the criminal offense described and prohibited by the Criminal Code of Georgia, Section 26-2105, (a), (b) and Criminal Code of Georgia, Section 26-2011, (a), (b), (c), (d).

The sentence of the Court was twelve months probation and a fine of Seven Hundred Fifty Dollars ($750.00).

Notice is hereby further given that the said BILLY JENKINS defendant in the above named, numbered and stated case, appeals to the Supreme Court of Georgia from the Order and Judgment of the Superior Court of Dougherty County, Georgia, overruling the Demurrer of the defendant on each and every ground thereof, said Order and Judgment having been signed by the Judge of Dougherty Superior Court on the 20th day of March, 1972, and filed in the Office of the Clerk of Dougherty Superior Court on said date.

The Clerk will please omit nothing from the record on appeal.

Transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

Dated this the 21st day of April, 1972.

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY

PETER ZACK GEER
OF COUNSEL FOR DEFENDANT

CHARLES F. HATCHER
OF COUNSEL FOR DEFENDANT

THE STATE versus BILLY JENKINS *Defendant*	IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA ACCUSATION FOR DISTRIBUTING OBSCENE MATERIAL NO. 24883

The defendant in the above identified and numbered case having applied to this court, pursuant to Rule 10-F, Rules of the Supreme Court of the State of Georgia, for an order directing the transmission to the Supreme Court of the State of Georgia of the film, Carnal Knowledge, and all physical exhibits introduced in the trial of the case by the defendant, as part of the record in said case on appeal, and the same having been duly considered;

IT IS, THEREFORE, ORDERED that the Clerk of Dougherty Superior Court transmit to the Supreme Court of the State of Georgia the film, "Carnal Knowledge" and all physical exhibits introduced at the trial of the case by the defendant, as part of the record in said case on appeal.

SO ORDERED this the 21st day of November, 1972.

/s/ Asa D. Kelley, Jr.
JUDGE SUPERIOR COURT
DOUGHERTY JUDICIAL
CIRCUIT

Georgia, Dougherty County

Copy of foregoing order served upon Hon. Robert W. Reynolds, District Attorney, by mailing the same to him in a properly addressed envelope with sufficient postage thereon to insure delivery. This 21st day of November, 1972.

PETER ZACK GEER
Counsel for defendant

[Title omitted in Printing]

ENUMERATION OF ERRORS
[IN THE SUPREME COURT OF GEORGIA]

1.

The trial court erred by its order of March 20, 1972, (R-12) in overruling the Demurrer of the defendant, (R-8,9,10), and each and every ground of said Demurrer, namely grounds 1 through 6, inclusive.

2.

The trial court erred by its order of March 20, 1972, in overruling ground 3, Paragraph 3, of defendant's Demurrer, (R-8).

3.

The trial court erred by its order of March 20, 1972, (R-12), by overruling ground 4, Paragraph 4 of defendant's Demurrer (R-9).

4.

The trial court erred by its order of March 20,

1972, (R-12), in overruling ground 5, Paragraph 5, of defendant's Demurrer (R-9).

5.

The trial court erred by its order of March 20, 1972, (R-12), by overruling ground 6, paragraph 6, of defendant's Demurrer (R-9,10).

6.

The trial court erred in failing and refusing to give defendant's request for charge No. 1, (R-14), in that said request for charge was timely, was adjusted to the evidence and the offense laid in the accusation, and the failure to give said request to charge was harmful and prejudicial to defendant in that said request for charge defined community standards as being in the nation as a whole and any less standard applied in the charge is harmful and prejudicial to defendant, and the request for charge.

* * *

[R. 3, 10-13]

36.

The trial court erred in failing and refusing to give defendant's request for charge No. 50, (R-63), in that said request for charge was timely, was adjusted to the evidence, and to the offense laid in the accusation, and refusal to give said request for charge was harmful and prejudicial to the defendant, and said request for charge was demanded by the evidence and the offense laid in the accusation.

37.

The trial court erred in failing and refusing to give defendant's request for charge No. 51, (R-64), in that said request for charge was timely, was adjusted to the evidence, and to the offense laid in the accusation, and refusal to give said request for charge was harmful and prejudicial to the defendant, and said request for charge was demanded by the evidence and the offense laid in the accusation.

38.

The trial court erred in charging the jury, (T-66), the following:

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.";

in that said charge applies the test as to obscenity to "community standards" thus leaving the jury with the clear and strong understanding that community standards will be limited to Albany and Dougherty County, Georgia, alone, and removing from the consideration of the jury the test of obscenity as applied to community standards, in the nation as a whole, and the test thus applied by the court in this charge is harmful and prejudicial to the defendant and fails to protect his constitutional rights of freedom of speech and freedom of expression under the First Amendment of the United States Constitution.

39.

The trial court erred in charging the jury, (T-66), the following:

> "Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the effort to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their purient appeal.";

in that said charge left the jury with a clear and distinct impression that defendant, from the evidence, could be guilty by pandering, and said charge was not authorized by the evidence, was not adjusted to the evidence, and the same is harmful and prejudicial to the defendant.

40.

The trial court erred in charging the jury, (T-67), the following:

> "Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:
>
> (a) An act of sexual intercourse;".

in that there was no evidence in the case showing an act of sexual intercourse, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

41.

The trial court erred in charging the jury, (T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(b) A lewd exposure of the sexual organs;"

in that there was no evidence in the case showing an act of lewd exposure of the sexual organs, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

42.

The trial court erred in charging the jury, ((T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(c) A lewd appearance in a state of partial or complete nudity;"

in that there was no evidence in the case showing an act of lewd apperance in a state of partial or complete nudity, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

43.

The trial court erred in charging the jury, (T-67), the following:

"Now, Code Section 26-2011 provides: A person commits public indecency when he performs any

of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(d) A lewd caress or indecent fondling of the body of another person.";

in that there was no evidence in the case showing an act of a lewd caress or indecent fondling of the body of another person, (T-32), (R-76), and said charge was not adjusted to the evidence, and was harmful and prejudicial to the defendant.

The Supreme Court of Georgia has jurisdiction in this case for the reason that the same involves a conviction under a State Statute that has been challenged by demurrer as being unconstitutional in violation of the United States Constitution (R. 8-10), and is, therefore, a case assigned by the Constitution of Georgia of 1945 to the Supreme Court of Georgia, Article VI, Section II, Paragraph IV, Constitution of the State of Georgia of 1945; (Section 2-3704; Georgia Code Annotated).

WHEREFORE, Appellant prays that the foregoing Enumeration of Errors and each and every ground thereof be considered by this Honorable Court and the errors herein complained of be reversed.

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY

By: /s/ Peter Zack Geer
PETER ZACK GEER

By: /s/ Charles F. Hatcher
CHARLES F. HATCHER
Attorneys for Appellant

607 tr 7

IN THE

SUPREME COURT OF GEORGIA

Decided July 2, 1973

27692. JENKINS v. THE STATE

The evidence amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under Georgia statutes.

JORDAN, Justice. Billy Jenkins appeals his conviction and sentence for the offense of distributing obscene materials. The conviction is based on the fact that he exhibited the film Carnal Knowledge in a movie theater in Albany, Georgia.

The threshold question to be decided is whether or not the showing of the film Carnal Knowledge violates Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials. The trial jury, under proper instructions from the court, has found the defendant guilty. After a review of the record and a viewing of the film by this court we affirm.

Code Ann. § 26-2101 (b) provides that "Material is obscene if considered as a whole, applying com-

munity standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." The accusation charges the defandant "with the offense of distributing obscene material." The accusation without expressly referring to Code Ann. § 26-2105 is then cast in the language of the prohibited acts as defined in Code Ann. § 26-2011. The appellant contends that the accusation is defective in that it fails to include the definition of obscene materials as defined in Code Ann. § 26-2101(b). This view is adopted by the minority which seizes upon this alleged defect to hold Code Ann. § 26-2105 unconstitutional.

It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81). It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.

The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. In *Roth v. United States*, 354

U.S. 476, it was held that "obscenity is not within the area of constitutionally protected speech or press." *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of "national standards," thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 SE2d 894) in line with *Miller*, supra, on this point.

This court has held that the exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. *Evans Theatre Corporation v. Slaton*, 227 Ga. 377 (180 SE2d 712). In *Slaton v. Paris Adult Theater, I*, 228 Ga. 343 (185 SE2d 768) that court held that the films involved in that case were "hard core" pornography and that the commercial exhibition of such pictures is not protected by the first amendment. The Supreme Court of the United States which in effect affirmed the *Paris* case, supra, held that States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters; further holding that the exhibition of obscene material in such places of public accommoda-

tion is not protected by any constitutional doctrine of privacy, and that a commercial theater cannot be equated with a private home. See *Paris Adult Theater v. Slaton*, No. 71-1051, 41 LW 4935.

We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes.

Judgment affirmed. All the Justices concur, except Undercofler, Hawes, and Gunter, JJ., who dissent.

In the Supreme Court of Georgia

27692. JENKINS v. THE STATE (607)

GUNTER, Justice (dissenting). The majority has today affirmed the criminal conviction of the appellant for showing the motion picture "Carnal Knowledge" to a theatre audience in Dougherty County, Georgia. The majority has held that the exhibition of this film in this "local community" is not entitled to the protection of the First Amendment as applied to Georgia and this "local community" by the Fourteenth Amendment. I am in disagreement with the majority, and I respectfully dissent. Having viewed this film with the other members of the Court, I must say, quite subjectively of course, that it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States. Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and "local communities" in Georgia.

I am in disagreement with my brothers of the majority for several reasons, and I shall attempt to set them forth in this dissent.

I.

The decision of the Supreme Court of the United States in *MILLER v. CALIFORNIA*, 41 LW 4925, (decided June 21, 1973), inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. As the

MILLER decision said, the history of the Supreme Court's obscenity decisions has been "somewhat tortured". 41 LW at 4926. I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection.

MILLER gave a new definition of pornographic, unprotected material; *MILLER* laid down basic guidelines for the trior of fact to use in determining what is protected material from what is unprotected material; *MILLER* changed the yardstick for measuring obscene material from "national standards" to "contemporary community standards"; and *MILLER* reiterated that if the application of its definitions, guidelines, and standards do not sufficiently protect First Amendment rights in any case, then First Amendment values are "adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary".

In the case at bar the film "Carnal Knowledge" was shown by the appellant to a theatre audience in Doughtery County, Georgia; a warrant and accusation were issued against the appellant charging him with having committed a crime by showing the film; and the appellant's' trial and conviction by a jury followed. All of this took place in the first four months of 1972, long before the changing of definitions, guide-

lines, and yardsticks of measurement by the *MILLER* decision rendered June 21, 1973. Yet the *MILLER* criteria have been applied by the majority in this case in affirming the appellant's conviction. That cannot be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the appellant.

In 1972 the appellant had every legal right to believe that the yardstick that he was to use in distinguishing unprotected from protected material was "national standards". The Supreme Court's opinion in *JACOBELLIS v. OHIO*, 378 US 184, (1964), now relegated by *MILLER* to a mere plurality decision, said: "We thus reaffirm the position taken in *ROTH* to the effect that the constitutional status of any allegedly obscene work must be determined on the basis of a national standard." Six Justices made up the *JACOBELLIS* majority, and not one of them gave the slightest indication that a national standard was not the yardstick to be applied.

Understandably then, appellate court judges or persons dealing in material that might be unprotected legitimately used a national standard yardstick to determine for themselves whether the material was protected or not. In the case of *FELDSCHNEIDER v. THE STATE*, 127 Ga. App. 745, (1972), the Court of Appeals of Georgia said at page 749: "The trial court erred in limiting the meaning of contemporary community standards to 'the local community — to your community.' If we were allowed to apply and be guided by the recent *GORNTO* case by the Supreme Court of our own state, the trial court's charge would have been correct; but we are controlled by the three re-

cent decisions of the United States Supreme Court, to wit, *JACOBELLIS, MANUEL ENTERPRISES* and *ROTH*, supra, and consequently, we hold that the trial court's charge in these two instances constituted reversible error." To the same effect is the decision in *FISHMAN v. STATE*, 128 Ga. App. 505, (1973), where a 7-2 majority of our Court of Appeals said on page 508: "The community standards to be applied are those of the national, not the immediate local community."

In January, 1972, when the motion picture "Carnal Knowledge" was exhibited by the appellant, the film had shown in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic.

"Carnal Knowledge" was reviewed in July, 1971, in the *Saturday Review*, the *Washington-Post*, the *New York Daily News*, *Time*, the *Atlanta Constitution*, and the *Atlanta Journal*. None of these reviews gave the slightest indication that the film was obscene-pornographic. Terry Kay, *Atlanta Journal* amusements editor, concluded the review in that Georgia paper as follows: "In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph.

"The effect is with the viewer, who — like it or not — has been stung to the quick by a prodding of human values.

"So what does 'Carnal Knowledge' tell us? Simply that we are victims, or subjects to be victimized, by

the very life-system we create for ourselves.

" 'Carnal Knowledge' says it with sex. It is theatrical that way — sex being the denominator common to everyone. But it could be said about any facet of our lives.

"It is a movie that will be controversial in the heaviest sense of the word, but it is still one of the best that we have had in a long time."

In *MILLER* the Chief Justice of the United States said: ". . . a 'national standard' of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of the trial as limiting State prosecution under the controlling case law." However, the Chief Justice then went on to say that since the appellant in that case did not raise the "national standard" issue at the trial but only on appeal, the trial court's charge to the jury that it consider state community standards was not a constitutional error.

To me, this retroactive application of the *MILLER* yardstick as opposed to the *JACOBELLIS* yardstick has the effect of saying that a theatre operator could rely on *JACOBELLIS* in January, 1972, in deciding whether to exhibit a film, but in April, 1972, when he was tried before a jury for exhibiting the film, it was all right for the Court and jury to completely ignore the standard established by *JACOBELLIS* and apply a different standard which had not at the time of the trial been enunciated and which would not be established by the Supreme Court of the United States until June 21, 1973.

I should add that in the present case the "national standard" issue was raised by the appellant in both the trial court and the appellate court.

The majority here today has retroactively applied the *MILLER* "contemporary community standards" yardstick in affirming a criminal conviction, thereby depriving appellant of his legal right in January, 1972, to have applied a "national standard" yardstick in making his decision that the film "Carnal Knowledge" came within the protection of the First Amendment.

If, between the time of *JACOBELLIS* and the time of *MILLER*, the Justices of the Supreme Court of the United States did not know what yardstick to apply, and then changed rather dramatically from one to the other, how can a theatre manager in Georgia be faulted, much less criminally convicted, for having made a decision in 1972 based on the *JACOBELLIS* national standard?

The retroactive application of *MILLER* in this manner in this case by the majority has, in my opinion, deprived appellant of due process of law under both the Georgia and Federal Constitutions.

II.

Assuming that what I have said heretofore, to the effect that the retroactive application of local community standards in this case is constitutionally impermissible, is incorrect, and the majority today holds that I am wrong on this point, then the film "Carnal Knowledge" is, in my judgment, entitled to the protection of the First Amendment even after applying local contemporary community standards.

MILLER, as noted earlier, reasserts that First Amendment values "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The so-called plurality opinion in *JACOBELLIS* said: "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . We would reiterate . . . that 'the portrayal of sex, e.g. in art, literature and scientific works, it not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' . . . It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection."

As I read the majority opinion in *MILLER*, it approves and reaffirms these enunciations procreated into constitutional law in *JACOBELLIS* by a mere plurality of the Justices.

If there ever has been or will be a case where independent appellate review of the facts as to whether the material involved is constitutionally protected is necessary to protect First Amendment values, then the case at bar is the case.

This Court has conducted an independent review. We have seen the film "Carnal Knowledge".

Four members of this Court deem it to be obscene, pornographic, unprotected material. Three members of this Court, including the writer, would hold it to be constitutionally protected material.

In Division Four of the *MILLER* opinion the Chief Justice said: "The dissenting Justices sound the alarm of repression. . . . These doleful anticipations assume that Courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."

My experience with this one case teaches me that the "alarm of repression" was validly sounded; it also teaches me that the *MILLER* majority's assumption, that Courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge; all of which leads me to repeat that often-stated assertion by lawyers: a majority of the Justices of the Supreme Court of the United States is not final because the members of that majority are infallible, — that majority is infallible only because it is final.

If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

III.

The appellant's conviction should not be affirmed because he was not legally accused of having committed a crime.

A warrant was issued for the appellant for having violated Ga. Code § 26-2105. This Code Section was enacted by the Georgia legislature in 1971, and this case is the first time that this Court has given consideration to it.

This statute, as relevant in this case, provides as follows:

> "(a) Every person who, during the course of a . . . motion picture, engages in conduct which would be public indecency under § 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.
>
> "(b) Every person who . . . knowingly exhibits . . . a motion picture . . . containing such conduct shall be guilty of a misdemeanor."

Georgia Code § 26-2011, our public indecency statute referred to in Code § 26-2105, is as follows:

> "A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor: (a) An act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd caress or indecent fondling of the body of another person."

It is thus seen that the conduct referred to in Code § 26-2105 is "public indecency" or "indecent exposure. Code § 26-2105 does not make reference in any manner whatsoever to "obscene materials".

Prior to arraignment and trial the appellant attacked and moved to dismiss the Accusation that was preferred against him based on the warrant. His contention was that the warrant and the Accusation were based on the 1971 Georgia statute (Code § 26-2105), and that the 1971 Georgia statute was unconstitutional. The trial judge overruled these constitutional attacks.

In my opinion the 1971 Georgia statute is patently unconstitutional. This statute attempts to transfer the crime of public indecency into the motion picure art form. This cannot be done if the First Amendment means anything at all, and if a motion picture is a work or material that enjoys protection under the First Amendment. Conduct performed in person and in public, such as indecent exposure, is not protected by the First Amendment. Conduct portrayed in the motion picture art form is protected by he First Amendment unless the portrayal, considered in the entire context of the motion picture, lacks "serious literary, artistic, political, or scientific value" (*MILLER v. CALIFORNIA* standard) or is "utterly without redeeming social value" (pre-*MILLER v. CALIFORNIA* standard).

In other words, a single or even several acts of public indecency portrayed in a motion picture or described by the written word in a novel cannot be defined as a crime because of the protection given to

motion pictures and novels as forms of expression by the First Amendment. The entire motion picture or the novel must be considered as a whole in determining whether the work is pornographic, thus falling outside of the protection of the First Amendment.

The *MILLER* opinion says: "State statutes designed to regulate obscene materials must be carefully limited. See *INTERSTATE CIRCUIT, INC. v DALLAS*, supra 390 US, at 682-685 (1968)."

The 1971 Georgia statute is not "carefully limited". It says that an actor who portrays one or more acts of indecent exposure in a motion picture is guilty of having committed a crime. It further says that one who exhibits a motion picture containing such a portrayal is guilty of a crime.

I think that this 1971 Georgia statute is directly violative of the First Amendment, and I further think that it violates the Fourteenth Amendment in that it is overly broad.

The warrant in this case, and the Accusation based on the warrant, charged the appellant only with having violated Code § 26-2105. In my view this statute is unconstitutional. A criminal charge cannot be founded on a void statute. Therefore the Accusation charged no crime at all, and it should have been dismissed by the trial judge when properly attacked in the trial court.

It follows that I would reverse this criminal conviction.

I respectfully dissent.

In the Supreme Court of Georgia

27692 JENKINS v. THE STATE (607)

HAWES, Justice, dissenting. I join in the dissenting opinion of Mr. Justice Gunter, a classic of legal reasoning and First Amendment wisdom, and I would add nothing to what has been said were it not for my concern for the grave danger to free speech and expression inherent in the majority opinion and about which I cannot here remain silent.

Two aspects of the opinion of the majority which are of most concern to me are the following: (1) the tacit approval of small towns and hamlets as being the "community" from which the standard for obscenity is drawn; and (2) the determination by four members of this court, upon an independent appellate review, that the film *Carnal Knowledge* is obscene, that is, that it has no artistic or literary value and is "utterly without redeeming social value." To give approval to the first would be to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedom of individuals to participate as they will in the general commerce of ideas. And to approve of the latter would be to equate realistic commentary on our sexual natures in a social context with that of obscenity, an equivalence surely belied as a matter of constitutional law and as a matter of fact. Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in *Slaton v. Paris Adult Theater I*, 228 Ga. 343 (185 SE2d 768) (1971).

I add these few remarks only because I believe if the majority opinion is accepted we shall have suffered a serious injury to free speech and free expression in Georgia.

27692

SUPREME COURT OF GEORGIA

ATLANTA, July 2, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Billy Jenkins v. The State

The case came before this court upon an appeal from the Superior Court of Dougherty County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Undercofler, Hawes & Gunter, JJ., dissent.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, AUG. 14, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Smith, Gardner, Wiggins, Geer & Brimberry paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, *Clerk*

CERTIFICATE OF SERVICE OMITTED
IN PRINTING

Supreme Court of the United States

No. 73-557

Billy Jenkins,

Appellant,

v.

Georgia

APPEAL from the Supreme Court of the State of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 10, 1973